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Fortress Financial and Pension Services, Inc. v. W. Mack Watkins and Christopher M. Watkins: Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

FORTRESS FINANCIAL AND PENSION SERVICES, INC., Plaintiff/Appellee. vs. W. MACK WATKINS and CHRISTOPHER M. WATKINS, Defendants/Appellants.	)	No. 20020630-CA

APPELLANTS' REPLY BRIEF

Appeal From the Third Judicial District Court, Salt Lake County
Case No. 000904654, Honorable Sandra N. Peuler

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Fortress Financial's response brief conclusively confirms the merits of the Watkins' main points. Fortress Financial either ignores or concedes the central issues raised in this appeal.

First, the Watkins were found liable for damages on breach of an oral contract not pleaded and for which they did not consent to a trial. Fortress Financial does not dispute this key point. As such, it is irrelevant whether minimal evidence can be culled from the record to support Fortress Financial's arguments.

Second, the Watkins indisputably did not admit liability on any oral contract. The record is absolutely clear on that point.

Third, Fortress Financial concedes the Independent Contractors Agreements were fully integrated, unambiguous contracts and that parol evidence was not introduced to vary their terms. As such, the district court's findings and conclusions cannot be sustained. The Agreements expressly govern the managed accounts, form the basis for the plaintiff's Complaint, and contradict the decision below, regardless whether this Court employs a legal or factual review.

For these and the other reasons set forth herein, this Court should reverse the errors made in the lower court.

RESPONSE TO PRELIMINARY ASSERTIONS

I. FORTRESS FINANCIAL MISSTATES AND MISCITES PRELIMINARY BACKGROUND INFORMATION IN ITS BRIEF.

A. Factual Background Supplied by Fortress Financial is Erroneous.

As a preliminary matter, the record does not support two factual assertions made by Fortress Financial in its "Nature of the Case" section.

First, Fortress Financial suggests that "[t]he issues at trial related to causes of action for breach of contract, written and verbal." (Aplee. Br. at 2.) Fortress Financial cites only the district court's Minute Entry for this proposition, which is the underlying ruling the Watkins claim is erroneous. (*See id.,* citing R. 148.) The Watkins clearly and meticulously showed this Court in their opening brief that the trial of this matter was explicitly limited by the litigants to damages for breach of the written contracts. (Br. of Aplts. at 13-16, with record quotations and citations.) Fortress Financial has not responded at all to that showing.[1]

Second, Fortress Financial misstates the record when it suggests "[t]he Watkins admitted that they were not to receive a commission on the managed accounts because their clients were already paying the Watkins a management fee as the money managers."

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[1] The parties did try liability on Fortress Financial's separate claim that the Watkins breached the written agreements by giving their clients discounts without authorization from Fortress Financial, as alleged in paragraph 7 of the Complaint. (R. 2 ¶ 7; R. 192, pp. 8-9.) However, the district court dismissed that claim, no cause of action, and it is not at issue in this appeal. (R. 192, pp. 172-73.) The remainder of the trial was limited to damages for breach of the written agreements based on the Watkins' admitted failure to transfer advisory clients to Fortress Financial, as alleged in paragraph 6 of the Complaint. (R. 2 ¶ 6; R. 192, p. 8.)

(Aplee. Br. at 2.) The record citations do not support this suggestion, nor could they, as the Watkins argued just the opposite below. Pages 15-16 of the trial transcript reflect testimony of Fortress Financial's Tom Schaumberg,[2] not of Mack or Chris Watkins. (R. 192, pp. 15-16.) Page 99 of the transcript is Mack Watkins' testimony in which he testified only that he was not expecting to get commissions for any trades on the managed accounts and that he was not compensated for those accounts. (R. 192, p. 99.) And on page 123 of the transcript, Chris Watkins testified that an advisory firm charges a management fee to its clients to manage assets. (R. 192, p. 123.)

The assertion made by Fortress Financial is in fact the exact opposite of the Watkins' position below. Chris Watkins consistently testified that he would have received a commission on the managed accounts had they been transferred because the written contract called for it, and the fact his corporate employer was receiving a management fee as a money manager did not preclude his receiving such a commission. (R. 192, pp. 76-78, 131-33.) Mack Watkins testified simply that compensation for the managed accounts related solely to Chris Watkins: Mack would be out of the country, would not be trading on the managed accounts, and did not expect to and did not receive any commissions whatsoever. (R. 192, pp. 98-99.) The suggestion that the Watkins

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[2] Mr. Schaumberg's name is spelled a variety of ways throughout the record, including as "Shaumberg" throughout the body of the trial transcript. This is the spelling the Watkins used in their opening brief. However, the correct spelling appears to be "Schaumberg." *See* Defs.' Ex. 1. The correct spelling of Mr. Schaumberg's name will be used throughout this brief.

"admitted" Fortress Financial's unsupported position is belied by the record and is misleading.

Fortress Financial also makes two important concessions in its Statement of the Case and Statement of Relevant Facts. First, Fortress Financial acknowledges that "the parties had executed a written contract" that had governed their relationship "since 1992." (Aplee. Br. at 2.) Second, Fortress Financial acknowledges that "the Watkins admitted liability to paragraph 6 of the Complaint." (Aplee. Br. at 4.) Paragraph 6 relates directly and solely to breaches of written contracts that were attached to the Complaint and referred to in the Complaint. (R. 1-3, 4-23.) As shown more fully in the remainder of the Watkins' briefing, this is precisely why the issues at trial were limited as they were.[3]

B. The Watkins Have Correctly Identified the Proper Standards of Review.

Fortress Financial cannot properly characterize all the issues raised by the Watkins in this appeal as factual in nature. (Aplee. Br. at 7.) Factual findings are indisputably reviewed by this Court under the "clearly erroneous" standard. Nevertheless, this appeal raises significant legal issues that are to be reviewed by this Court for correctness, including: (1) the legal effect of the Watkins' admission of liability in light of the

[3] Page 4 of the Watkins' opening brief argues the trial was limited to damages for the Watkins' "admitted breach of paragraph 6 of the written agreements" when it should have read "admitted breach of the written agreements as pleaded in paragraph 6 of the Complaint." Indeed, paragraph 6 of the Complaint tracked the language of the written contracts requiring the Watkins to transfer advisory clients and specifically alleged the Watkins' breach commenced "[a]t the time the agreements were signed." (R. 2; *see also* R. 11, 22.)

allegations in and attachments to the Complaint; (2) the scope of the issues pleaded and tried; (3) the interpretation and construction of unambiguous written contracts; (4) the existence of an alleged oral contract in light of integrated written contracts covering the same subject matter, which formed the basis for the suit; and (5) the availability of applicable defenses occasioned by the district court's ruling in the first instance. To suggest this Court is limited to reviewing factual findings in this appeal is to willfully ignore substantial portions – the main points – of the Watkins' Brief on Appeal.

ARGUMENT

I. THE DISTRICT COURT'S LEGAL ERRORS REQUIRE REVERSAL.

A. The Parties Tried Damages After the Watkins Admitted Liability for Breach of the Written Agreements.

Fortress Financial simply misapprehends or chooses to ignore the Watkins' first point in this appeal. (Aplee. Br. at 7-10.) Counsel and the district court specifically limited the relevant issue to be tried to damages for breach of the written contracts, as liability on such written contracts had previously been admitted. (R. 192, p. 8.) It is irrelevant that there was "evidence to conclude the Watkins breached [an] *oral* managed account agreement." (Aplee. Br. at 9, emphasis added.)

A case in point is *National Farmers Union Property & Casualty Co. v. Thompson,* 286 P.2d 249 (Utah 1955). In *Thompson,* an insurer commenced suit to recover monies paid to its insured under a fire policy. *See id.* at 250. The complaint alleged the building in question was worth $2,000.00, which the defendant admitted by answer. *See id.* at 253. The value of the building was consequently not an issue at trial. *See id.* However,

evidence was admitted at trial to the effect the building's value was only $1,000.00. *See id.* No other value evidence was admitted. *See id.* After the jury returned a verdict valuing the building at $2,000.00, the district court *sua sponte* ordered a remittitur to $1,000.00 for the value of the building in the alternative to a new trial. *See id.* at 250. Before judgment was entered, however, the district court vacated that order to allow the $2,000.00 value found by the jury to stand. *See id.* The district court did so, it said, because at the time it entered its remittitur order, "'the court did not have in mind the fact that the parties, by their pleadings, had stipulated to the value of said structure.'" *Id.* at 252.

On appeal, the plaintiff argued there was evidence in the record to support the district court's original conclusion and that the district court should not have vacated its remittitur order. *See id.* at 250, 253. The plaintiff further urged that the court grant relief under Utah R. Civ. P. 15(b) and 54(c). *See id.* at 253. The Supreme Court rejected these arguments in language applicable to the instant case:

> Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it. This is recognized in Rule 15(b) which recites that such liberal amendment shall be allowed if the issue is tried "by express or implied consent of the parties." It does not appear that there was any such consent to try the issue of the value of this building. Defendant urges that had the matter been in dispute, he could have adduced evidence that this was a forced sale and other proof supporting his claim of value. The plaintiff had an opportunity to raise this issue, but instead of doing so, pleaded its value as $2,000, which was agreed to by the defendant.

Id. (citing *Taylor v. E.M. Royle Corp.*, 264 P.2d 279 (Utah 1953); *Morris v. Russell*, 236 P.2d 451 (Utah 1951)). Consequently, the Supreme Court determined the district court's finding of $1,000.00 value was properly reversed, notwithstanding the fact there was evidence in the record – indeed the only such evidence introduced at trial – to support it. *See id.*

This same substantive analysis applies here. Plaintiff Fortress Financial pleaded breach of the Watkins' written Independent Contractors Agreements. The Watkins admitted liability thereon. Trial was specifically limited to damages therefor. Had Fortress Financial wanted to raise the issue of breach of an oral agreement, it could have done so in its pleadings, in its opening statement, or in its closing argument, or otherwise given the required notice to allow the Watkins a fair opportunity to try that issue. It did not do so. The fact that evidence can be gleaned from the record to support the district court's decision does not change the fact that the Watkins did not try this issue expressly or impliedly. It is a "cardinal principal" in our system of justice that "if an issue is to be tried and a parties' rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it." *Id.*

Fortress Financial does not argue that the Watkins tried this issue expressly or impliedly, nor did Fortress Financial seek relief under Rule 15(b) or 54(c) – nor could it do so meritoriously given the state of the record.[4] Had the issue been so framed from the

[4] Furthermore, the failure to make any such arguments in its response brief waives the issue. *See* Utah R. App. P. 24(a)(9) (party's brief must contain "the contentions and reasons of the [party] with respect to the issues presented, . . . with citations to the

outset, or even when the case was argued to the district court, the Watkins would have responded vigorously and more fully with the types of arguments made here. But that was not the case. (*See, e.g.*, R. 192, p. 158 (Fortress Financial's closing argument regarding facts existing "at the time the contract was *executed*") (emphasis added); p. 159 (Fortress Financial's closing argument that written contract "clearly states" Watkins' obligation to pay clearing fee for advisory client transactions); p. 170 (Fortress Financial's closing argument regarding Mack Watkins' signing the written agreement).)

The district court clearly analyzed and should have had in mind the Watkins' written Admission of Liability related to the written contracts when it entered its ruling. Indeed, it was discussed by the parties before, during, and after the trial. (R. 192, pp. 8, 75-76, 160.) Thus, all Fortress Financial's appellate arguments regarding breach of a separate oral agreement based on Mr. Schaumberg's testimony – which constitute an obvious effort to avoid the clear operation of the written agreements and the Watkins' admission of liability – are unavailing.

More recently, in *Lee v. Sanders*, 2002 UT App. 281, 55 P.3d 1127, this Court reached a determination similar to that in *Thompson*. The plaintiff in *Lee* filed suit for a determination of his interest in real property and an order quieting title. *See id.* ¶ 3. The

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authorities, statutes, and parts of the record relied on"); Utah R. App. P. 24(b) (applying Rule 24(a)(9) to appellee); *Walker v. U.S. General, Inc.*, 916 P.2d 903, 908 (Utah 1996) (declining to address issue not briefed); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) ("A brief must contain some support for each contention."); *American Towers Ass'n Inc. v. CCI Mechanical Inc.*, 930 P.2d 1182 (Utah 1996) (issues not briefed are deemed waived and abandoned); *Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746, 751 (Utah App. 1991) (same).

district court issued a decision determining the equity in the property and entering a money judgment. *See id.* ¶ 4. On appeal, the defendant argued that the district court erred as a matter of law because the equity issue was neither pleaded nor tried by consent. *See id.* ¶ 7. This Court agreed, holding that "[a] trial court's findings should fit 'within the framework of the petition as originally drawn, or as amended' and should be supported by the evidence presented." *Id.* ¶ 7 (quoting *In re Behm's Estate*, 213 P.2d 657, 663 (Utah 1950). The Court correctly observed that "'[a] trial court may not base its decision on an issue that was tried inadvertently.'" *Id.* (quoting *Archuleta v. Hughes*, 969 P.2d 409, 413 (Utah 1998)). The Court rejected the trial court's notion that the parties had "put at issue the value of the real property." *Id.* ¶ 8.

> We have thoroughly reviewed both the complaint and the answer and can nowhere find any language that would empower the trial court to determine the actual value of the property or to reduce the Parties' relative interests to a money amount. We therefore conclude that the trial court erred in determining that value had been put at issue in the pleadings.
> . . .
> . . . Accordingly, to the extent that the trial court may have relied either upon evidence submitted by the Parties, or trial testimony, to support its decision, the trial court erred [as a matter of law] in deciding the issue of the property's value.

Id. ¶¶ 9-10; *see also Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733 (Utah 1984) (reversing and remanding decision reached by district court on issues not framed by the pleadings); *Colman v. Colman*, 743 P.2d 782, 785 (Utah App. 1987) ("'A trial court may not base its decision on an issue that was tried inadvertently.'") (quoting *MBI Motor Co. v. Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974)); *Fisher v. Fisher*, 907 P.2d 1172, 1176 (Utah App. 1995) ("That the issue has been tried by the express or implied

consent of the parties must be evident from the record."). The district court's decision here is erroneous as a matter of law and should be reversed.

Fortress Financial also argues that the district court found the Watkins admitted liability both for the breach of the written Independent Contractors Agreements *and* for the oral agreement the court purported to have found for the first time in its ruling. (Aplee. Br. at 10.) While irrelevant if the district court committed reversible error in ruling on this issue, this is wrong as a matter of law in any event, as demonstrated by the record in this case. (R. 2, 78-79; *see also* R. 192, pp. 75-76 (trial testimony of Chris Watkins reiterating admission of liability under his *written* contract).)

The upshot of all this is that damages were awarded for the alleged breach of a separate oral contract that was not and should not have been at issue. Fortress Financial's failure to carry the burden of showing damages for breach of the written contracts sued on, to which the Watkins stipulated they were liable, requires outright reversal of the judgment. (*See* Br. of Aplts. at 12-13, making unrefuted showing.)

B. Fortress Financial's Concessions Require Reversal.

Regardless whether the alleged separate oral "managed account agreement" issue was properly framed and tried, reversal is required because the written agreements clearly govern the managed accounts relationship. Fortress Financial concedes two dispositive points on this issue: (1) the Independent Contractors Agreements are fully integrated contracts (Aplee. Br. at 14 (arguing no evidence questioned integration of written agreements)); and (2) no parol evidence was introduced to vary the terms of the

Independent Contractors Agreements (Aplee. Br. at 14-15.) Each of these concessions resoundingly confirms the merits of the Watkins' legal arguments on appeal.

First, a fully integrated contract governs the parties' relationship with respect to the subject matter of that agreement, a proposition with which Fortress Financial does not take issue. *See Bailey-Allen Co. v. Kurzet*, 945 P.2d 180, 190 (Utah App. 1997); 17A Am. Jur. 2d *Contracts* § 398, at 424-25 (1991). "'If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement.'" *Id.* (quoting *Hall v. Process Instruments & Control, Inc.*, 866 P.2d 604, 606 (Utah App. 1993), *aff'd*, 890 P.2d 1024 (Utah 1995)).

The subject matter of the written Independent Contractors Agreements indisputably related to and governed the managed accounts in express language that Fortress Financial does not refute or even address. (*See* Independent Contractors Agreements, Pl.'s Ex. 2, §§ 8, 9, 26, 28, 30; *see also* Br. of Aplts. at 9-10, 18-19 (collecting and discussing these provisions)). Section 28 of the written agreements forms the very basis for the allegation in paragraph 6 of the Complaint that the Watkins were to transfer "existing and future advisory clients." (R. 2, 22.) Section 8 of the written agreements describes how payments should be made by "advisory clients." (R. 16.) Section 9 directs how to handle securities certificates of an "advisory client." (R. 16. Section 26 discusses approval for "trades for advisory clients." (R. 21-22.) Section 21 guarantees compensation for "investments bought and sold through [the Watkins]." (R. 19.) By Fortress Financial's own admission, Section 21 also covers "clearing fees" *for*

advisory clients. (R. 19; R. 192, pp. 22-23.) In short, the written contracts apply to "all" transactions and trades. (R. 15.)

Fortress Financial does not even address the Watkins' argument on this point because it cannot in light of the clear, unambiguous, unequivocal language of the written agreements. A fully integrated contract contains all terms relating to the subject matter of the document, and all other oral agreements related to it are deemed merged therein. *See Kurzet*, 9455 P.2d at 191; 17A Am. Jur. 2d *Contracts* § 397, at 424. Thus, the commission schedule found in the Compensation section of the Independent Contractors Agreements governs the parties' managed accounts relationship as a matter of law.

Second, Fortress Financial concedes that it is not attempting to vary the terms of the written contracts with parol evidence. As those contracts relate unequivocally to managed accounts, this concession amounts to a further acknowledgment that all provisions of the written agreements must apply to managed accounts, including the key compensation provisions. *See Tretheway v. Furstenau*, 2001 UT App. 400, ¶ 9, 40 P.3d 649.

If, as Fortress Financial argues, the separate oral agreement "did not 'contradict, alter, add to, or vary the plain terms of the [parties'] writing,'" but "was 'separate and distinct from, and independent of, the written instrument,'" then the judgment must also be reversed. (Aplee. Br. at 15, quoting *Applied Genetics Int'l, Inc. v. First Affiliates Secs., Inc.*, 912 F.2d 1238, 1245 (10th Cir. 1990)). Utah courts are required to give effect to all terms of parties' contractual agreements. *See Tretheway*, 2001 UT App. 400, ¶ 9,

40 P.3d 649. As the written contracts indisputably require the payment of commissions for all business transacted by the Watkins through Fortress Financial, the commission schedule applies by its clear terms and must be given effect.

Exercising its power of appellate review, and reviewing the district court's legal determinations without deference to the decisions made below, this Court should reverse the district court's construction of the written Independent Contractors Agreements. *See State v. Deli*, 861 P.2d 431, 433 (Utah 1993) (no deference given on appeal "in any degree" to district court's conclusions of law). They apply by their terms to managed accounts. The district court's determination to the contrary ignores the plain language of the Agreements and cannot be sustained.

II. EVEN IF A FACTUAL ANALYSIS WERE APPROPRIATE, THE DISTRICT COURT'S FINDINGS ARE AGAINST THE CLEAR WEIGHT OF THE EVIDENCE AND ARE CLEARLY ERRONEOUS.

The Watkins have shown that the legal issues raised in this appeal require reversal by this Court. Even if the Court were to proceed with a factual analysis, however, reversal would still be required.

A. The District Court Indisputably Misunderstood the Watkins' Evidence and Argument.

Strongly indicative of the clear error in the district court's findings is its determination that it did "not recall receiving any evidence or any argument from [the Watkins'] counsel" that commissions were to be paid the Watkins for advisory clients. (R. 157-58.) The district court utterly missed the point. Virtually the entire damage dispute centered on the deductibility of the Watkins' commissions from the damages

found. The evidence and argument on this point reflected in the trial transcript is significant and reflects the primary damage issue raised by the Watkins (and opposed by Fortress Financial). (*See, e.g.*, R. 192, pp. 76, 98-99, 126-34, 158-60, 164-70; Defs.' Ex. 3.) The district court simply ignored the totality of the Watkins' efforts at trial on this key point. The court's decision cannot stand.

B. No Deference is Due to the District Court's Credibility Determination, As It Is Irrelevant as a Matter of Law and Clearly Erroneous On Its Face.

Fortress Financial argues that this Court should defer to the district court's credibility determination in favor of Mr. Schaumberg and against Chris Watkins. (Aplee. Br. at 7-8, 15-16.) The Watkins acknowledge both that credibility determinations are usually deferred to by this Court on review and that the district court made a credibility determination here. Nevertheless, this Court may reassess the credibility determination if it is based on an impossibility or if its falsity appears on its face. *See, e.g.*, *State v. Workman*, 852 P.2d 981, 984 (Utah 1993).

In this case, this Court should not defer in any fashion to the district court's credibility determination, for two reasons.

First, the existence of a fully integrated, unambiguous written contract relating to the managed accounts, which is to be construed by the Court as a matter of law, renders the testimony of any witness regarding the terms of that agreement a legal nullity. *See, e.g.*, *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995) (where "the language of the contract is not ambiguous, then the parties' intentions must be determined

solely from the language of the contract"); *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) ("If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement.").

Second, even if the testimony of factual witnesses were properly considered, the underlying basis for the district court's credibility determination is flawed on its face. The district court declined to credit Chris Watkins' testimony because it determined he was inconsistent in his testimony:

> Christopher Watkins testified as to the managed accounts, that he expected to receive a commission on those accounts consistent with the written contract. However, the contract, plaintiff's Exhibit 2, also required the defendants to pay the management fee of $27 per trade, which was at variance with his testimony. So, on one hand he argued that he should receive commissions consistent with the written contract, but on the other hand testified that he was not required to pay the management fee as required by the same document. The inconsistency in his positions as to the terms of the agreement makes his testimony less credible than plaintiff's.

(R. 149-50.) The irony and erroneousness of this finding is enormous. Chris Watkins (truthfully) testified that, despite what the written contract said, the practice in his business dealings with Fortress Financial was that he did not pay clearing fees. (R. 192,

pp. 143-45.)[5] Fortress Financial argued, however, his paying this fee for managed accounts ***was required by the terms of the written contract.*** (R. 192, pp. 22-23, 143-454, 159.) The district court agreed, even though it inconsistently found the written contracts did not govern managed accounts. (R. 149.)

The glaring flaw in the district court's credibility analysis is that Mr. Schaumberg (and ultimately the district court itself) did the very thing the court indicated deserved a credibility demerit. Schaumberg testified on one hand that Chris Watkins was to pay the management fee for advisory client transactions because it was required by the written agreement, but on the other hand that Chris Watkins was not to receive the commissions set forth in the written contract because the written contract did not govern managed accounts. (R. 192, pp. 18-19, 22-23.) Not only were these two terms both in the same contract, they were in the ***very same provision of the written contract***, Section 21 governing "Compensation." (R. 19.) Either both terms applied to managed accounts or

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[5] Whether it was this trade or any other trade, every trade I did, that's how it worked.
Q. But weren't you under an obligation to reimburse Fortress Financial for that $27?
A. Absolutely not.
. . .
Q. (By Mr. Eder) So it's your testimony that the contract does not require you to pay that fee?
A. I never paid that fee ever.
(R. 192, pp. 143, 145.)

neither did. This unpersuasive credibility analysis should be reassessed by this Court and reversed, with no deference afforded the decision below.[6]

Mr. Schaumberg blatantly tried to pick and choose portions of the written contract he found favorable while rejecting others as "not applying" to managed accounts. This clearly appears in the record and cannot be disputed. The district court's decision to make a credibility determination against Chris Watkins and in favor of Tom Schaumberg was therefore based on something other than the record evidence discussed by the district court and was clearly improper. *Cf. Lee v. Sanders*, 2002 UT App. 281, ¶ 7, 55 P.3d 1127 (trial court's finding must be supported by evidence presented); *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1141, 1147 (Utah App. 1994) (findings are clearly erroneous when they are against the clear weight of the evidence or if the appellate court reaches the definite and firm conviction that a mistake has been made).

The dispute over the parties' respective damage calculations flowed inevitably from the question of whether commissions were to be deducted from payment on the managed accounts, as Schaumberg's calculation did not include them and Chris Watkins'

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[6] Moreover, Mr. Schaumberg himself admitted in a letter that was clearly not intended for the Watkins that "[e]ach ticket costs Fortress Financial $27 to execute the transaction," a fact he disavowed under oath at trial. (*See* Defs.' Ex. 1, p. 2; R. 192, p. 22.) In that admission, Mr. Schaumberg further admitted that Fortress Financial's "Gross commission calculation is the number of shares traded times 6 cents a share" and that "Net Commission is calculated by subtracting the ticket cost ($27) from the gross commission of each trade." (Defs.' Ex. 1, p. 2.) Notwithstanding these admissions, at trial Fortress Financial tried to saddle the Watkins with Fortress Financial's own cost of doing business. But if the Watkins were not to receive commissions, they could not logically be burdened with attendant costs. Fortress Financial inconsistently wants it both ways.

did. (*Cf.* Pl.'s Ex. 6 *with* Defs.' Ex. 3.) Using this credibility determination in any way to reach the decision below resulted in findings that cannot be supported. Reversal is required on this basis as well.

C. The District Court's Decision is Against the Clear Weight of the Evidence and Its Factual Findings are Clearly Erroneous.

Fortress Financial's concessions regarding integration and oral evidence ultimately render the factual analysis essentially moot, as the written contracts clearly govern. Even so, Fortress Financial fails to persuasively rebut the Watkins' factual analysis showing clear error. (Br. of Aplts. at 21-43.) Indeed, Fortress Financial fails convincingly to address all the evidence as marshaled and discussed by the Watkins. Instead, Fortress Financial cites merely to evidence that (1) Mr. Schaumberg testified to the existence and breach of a separate oral agreement, and (2) Larry Boydston testified the Watkins could not receive a management fee on the managed accounts at the same time they received a commission. Neither of these points carries the day, individually or collectively. The Watkins have shown in their opening brief and again here that neither of these grounds is a sufficient basis to justify the district court's decision on this record. (Br. of Aplts. at 35-42; *supra* part I.) Merely reiterating them does nothing for Fortress Financial.[7]

[7] Fortress Financial has also abandoned its argument made below that administrative regulations prevented the Watkins from receiving a commission. The Watkins demonstrated in their opening brief that the regulations required a showing of fraud which had not been met. (Br. of Aplts. at 41-42.) Fortress Financial has not disputed that, had the advisory clients been transferred, the Watkins would have made appropriate disclosures to their clients, who were all family members or close friends. It is also undisputed that had the advisory clients been transferred, the business would have been introduced to Fortress Financial by the Watkins; commissions should have resulted.

III. FORTRESS FINANCIAL CONCEDES THE SUBSTANCE OF THE WATKINS' STATUTE OF FRAUDS ARGUMENT.

The Watkins can and should be able to raise legal issues that only became issues as a result of the district court's ruling. Though this is clearly the exception, Utah appellate courts will consider issues raised in "exceptional circumstances that would justify addressing the issue." *Jolivet v. Cook*, 784 P.2d 1148, 1151 (Utah 1989). This exception "is a catch-all device," a "safety device to make certain that manifest injustice does not result from the failure to consider an issue on appeal." *State v. Archambeau*, 820 P.2d 920, 923 (Utah App. 1991). "Both the Utah Supreme Court and the Court of Appeals have often acknowledged this exception." *Id.* (collecting citations). Its application includes "rare procedural anomalies" like the one here. *See State v. Dunn*, 850 P.2d 1201, 1209 n.3 (Utah 1993). Where the district court's surprise ruling on *liability* in a *damages* trial was not anticipated by the Watkins, the attendant issues should be addressed in reviewing that ruling.

Fortress Financial does not take issue with the substance of the Watkins' statute of frauds argument. An argument not made in the appeal brief is waived. *See supra* note 4 (collecting citations). The Court should reverse on this basis as well.

IV. FORTRESS FINANCIAL'S "FRIVOLOUSNESS" ARGUMENT IS AN APPEAL TACTIC THAT SHOULD BE REJECTED.

Fortress Financial's suggestion that the Watkins' appeal is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law merits no lengthy response. Nowhere in their opening brief do the

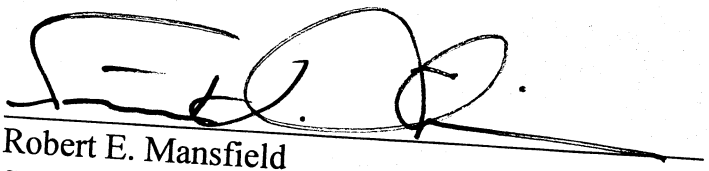
Watkins argue that "Fortress Financial 'completely failed' to produce evidence to support the jury's verdict." (Aplee. Br. at 21.) Not only is there no jury verdict, there is no "completely failed" language, let alone a quote to that effect; nor did the Watkins argue there was no evidence to support the district court's decision. The Watkins have consistently argued that (1) the district court made legal errors in concluding the Watkins previously admitted liability for an oral contract when they had not, and in ruling on issues not properly at issue; (2) the district court committed legal error in determining the Independent Contractors Agreements did not apply to managed accounts; and (3) in the alternative to these legal arguments, the district court's findings were clearly erroneous and against the clear weight of the evidence. The Watkins have carefully researched and supported these arguments with appropriate citations to the record and to controlling case law and by marshaling the evidence when required. Fortress Financial concedes all the key points. The Watkins' appeal merits reversal by this Court and exposes Fortress Financial's "frivolousness" argument for the legal tactic it is.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and remand as needed to assure the proper dispensation of justice under the controlling facts and law of this case.

DATED this 9th day of June, 2003.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing APPELLANTS' REPLY BRIEF to be mailed, postage prepaid, this 9th day of July, 2003, to the following counsel of record:

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